
OPINION OF THE PUBLIC ACCESS COUNSELOR

BRIAN VUKADINOVICH,
Complainant,

v.

INDIANA DEP'T. OF HOMELAND SECURITY | FIRE
AND BUILDING SAFETY DIVISION,
Respondent.

Formal Complaint No.
18-FC-46

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Homeland Security Division of Fire and Building Safety (IDHS) violated the Access to Public Records Act¹ (APRA). In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on March 20, 2018.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

In December of 2017, a fire occurred in the Town of Cedar Lake that damaged the home and a vehicle owned by Gordon and Mary Joan Dickson. This case involves a public records request connected to that fire.

On January 11, 2018, Brian Vukadinovich (“Complainant”) submitted a request to the Indiana Department of Homeland Security Division of Fire and Building Safety (“IDHS”) seeking the following information:

Did the state fire marshal investigate this fire? If so, what was the determination as to the cause of the fire? Were forensic experts involved in the investigation? Are the investigatory records and findings subject to public inspection? If so, I would like to request that all of the investigatory records and records of the findings as to the cause of the fire be provided to me.

That same day, IDHS acknowledged Vukadinovich’s request by email. On March 1, 2018, Vukadinovic contacted IDHS and stated that he was still waiting for production of the records he requested and asked the agency to send them at its earliest convenience.

Vukadinovich filed a formal complaint with this Office on March 20, 2018, asserting that he heard nothing further from IDHS on the request. He argues that IDHS has violated the Access to Public Records Act because it failed to provide the records he requested in a reasonable time.

IDHS disputes that an APRA violation occurred in this case. The agency argues that it responded to Vukadinovich’s request in a timely manner under the law. Furthermore, IDHS

contends that it has discretion under Indiana Code section 5-14-3-4(b)(1), APRA's investigatory records exception, to withhold the requested records from disclosure.

ANALYSIS

The primary issue in this case is whether IDHS's has failed to provide public records within a reasonable time as required by the Access to Public Records Act.

1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *Id.* There is no dispute that the Indiana Department of Homeland Security Division of Fire and Building Safety ("IDHS") is a public agency for the purposes of the APRA; and thus, subject to the Act's disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy the IDHS's public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Still, the Act contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind.

Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

Notably, a public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received or the request is deemed denied. Ind. Code § 5-14-3-9(c). If a records request is provided in writing, and the request is denied, the denial must also be provided in writing and contain a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record as well as the name and title of the official denying the record. Ind. Code § 5-14-3-9(d).

The parties do not dispute that IDHS properly acknowledged Vukadinovich's request within the requisite time period to avoid the request being deemed denied by operation of law. Instead, the crux of the dispute is whether IDHS complied with APRA's reasonable time standard by taking approximately two months to issue a denial to Vukadinovich.

1.1 Reasonable Time Standard

Under APRA, a public agency may not deny or interfere with the exercise of the right for any person to inspect and copy a public agency's disclosable public records. Ind. Code § 5-14-3-3(a). Toward that end, within a reasonable time after the request is received by the agency, the public agency shall either:

- (1) provide the requested copies to the person making the request; or
- (2) allow the person to make copies:

- (A) on the agency's equipment; or
- (B) on the person's own equipment.

Here, Vukadinovich and IDHS disagree about whether the agency's response time is appropriate for purposes of APRA. IDHS argues that it provided Vukadinovich a denial in a timely manner. The denial letter—dated March 19, 2018—is in response to Vukadinovich's request from January 11, 2018. That amounts to 67 calendar days.

IDHS asserts that because Indiana Code section 5-14-3-4(b)(1) applies to records requested by Vukadinovich that the reasonable time standard should not apply. This is because Indiana Code section 5-14-3-4.4 gives law enforcement agencies the discretion to neither confirm nor deny the existence of an investigatory record if doing so would jeopardize the investigation or public safety considerations. Typically this section is reserved for very unique circumstances where the investigation is so sensitive and out of the ordinary that the mere existence of an investigation could seriously impact ongoing law enforcement activities or put the public at risk. It would take extraordinary extenuating circumstances for small-town garage fire to qualify. IDHS has not provided such context.

In the alternative, IDHS argues that even if the reasonable time standard applies to denials that the agency satisfied the requirement.

This Office is required to liberally construe the provisions of APRA as instructed by the legislature. As a result, this Office interprets APRA's reasonable time standard, codified at Indiana Code section 5-14-3-3(b), to also apply to the agency's issuance of a denial to the requestor. Section 4.4 notwithstanding, to conclude otherwise would support the notion of a public records purgatory where requests lay stranded, neither granted nor denied by the agency. This result cannot be the intent of the legislature. Simply put, the reasonable time standard applies to the agency's issuance of a denial.

Even so, IDHS contends—in the alternative—that it denied Vukadinovich's request within a reasonable time under APRA.

APRA does not define *reasonable time*. As a result, this Office is regularly asked to make a determination on the issue.

The determination of what is a *reasonable time* for production of records, including an ultimate denial, therefore, depends upon the public records requested and circumstances surrounding the request. Although reasonable time is not defined in the APRA or by the courts, it is a standard which is addressed on a case-by-case basis.

The factors affecting the reasonableness of timely production of documents include but are not limited to:

- The size of the public agency;
- The size of the request;

- The number of pending requests;
- The complexity of the request; and
- Any other operational considerations that may reasonably affect the public records process.

Here, IDHS took approximately 67 days to invoke the investigatory records exception and deny Vukadinovich's request. Typically, this amount of time would exceed what this Office considers reasonable for a mere denial. Still, IDHS is a large public agency that receives a large volume of public records requests annually and has over 50 pending requests at given time with only one agency staff person assigned to do so. Further, IDHS contends that it is in the process of establishing and implementing policy change concerning how the agency handles its fire investigation reports and public requests for the reports.

Although it does not appear that Vukadinovich's request is complex or voluminous, the other relevant factors tend to favor IDHS. Of which, the most critical factor is the factor that weighs the operational considerations associated with the agency's public records process. At the time of the request, IDHS was establishing a new uniform policy that applies to the agency's response to public records requests.

Indeed, as stated above, a response time of 67 days to merely provide a denial to a requestor generally will not pass muster.

Still, in this case the establishment and implementation of a new policy at IDHS played a role in the delay that likely will not be a factor going forward.

Because this complaint can be resolved on narrower grounds, this Office will not address IDHS's second claim concerning the availability of the investigatory records exception to the agency in the context of its investigations through the Division of Fire and Building Safety.

In short, this Office agrees that the investigatory records exception is available in this context, but the availability of the exception is not at issue in this complaint.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana Department of Homeland Security Division of Fire and Building Safety did not violate the Access to Public Records Act based upon these unique circumstances.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor